

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

77-1107

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GUSTAVO PASSARELLI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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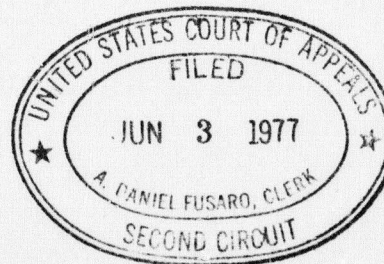


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1107

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

GUSTAVO PASSARELLI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Questions Presented

1. Whether the District Court erred in ruling inadmissible evidence offered by the Appellant to show his offers to repay and secure the debts due to the Barclays Bank of New York. (Applicable to Counts 7 and 8 of the indictment.)
2. Whether the District Court erred in rejecting the Appellant's requested instruction on offers to repay as probative on the Appellant's intent to injure or defraud the bank. (Applicable to Counts 7 and 8 of the indictment).

3. Whether the verdict is contrary to the weight of the evidence and is supported by substantial evidence (Applicable to Counts 7 and 8 of the indictment).
4. Whether a false statement must be made as to a material fact in order that it fall within the prohibition of Title 18 United States Code, Section 1014 (Applicable to Counts 10 and 12 of the indictment).
5. Whether the District Court erred in rejecting the Appellant's requested instruction on "materiality" of the alleged false statements made by the Appellant to the bank as bearing on the Appellant's intent to knowingly make a false statement to influence the bank. (Applicable to Counts 10 and 12 of the indictment).

Statement Pursuant to Rule 28 (3)

Preliminary Statement

This is an appeal by Gustavo Passarelli from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) rendered on February 24, 1977, after a jury trial convicting the Appellant of having conspired to violate Title 18 United States Code Section, 656 and Title 18 United States Code, Section 1014, in violation of Title 18, United States Code Section 371. The Appellant was also convicted on two counts, namely counts 7 and 8 of the indictment of having violated Title 18 United States Code, Section 656 and two counts, namely counts 10 and 12 of the indictment of having violated Title 18, United States Code, Section 1014.

The jury also found the Appellant guilty of the offenses set forth in Counts 3, 4 and 5 of the indictment. However, on motion of the Appellant his convictions on said three counts were reversed as the defendant, William H. Cleary was found not guilty on said counts and the Appellant could not as a matter of law be guilty as an aider and abetter if the principle who was the bank officer was found not guilty.

The Appellant was sentenced to two years in prison on counts 7, 8, 10 and 12 to be served concurrently and the Court suspended

all but six months of the sentence on each one of those counts. In addition, the Court suspended its sentence on count 1 of the indictment, that being the conspiracy count. The court fined the Appellant in the sum of \$2,500.00 on count 7. The Appellant was sentenced to serve unsupervised probation for period of 18 months after completion of the aforesaid six months sentence. The Appellant is free pending the prosecution of this appeal on a \$10,000.00 personal recognizance bond, executed by the Appellant and co-signed by his wife, Janet Passarelli and his mother-in law, Mary Roccario.

Morton Berger was counsel to the Appellant during the trial and has been retained by Appellant for purposes of this appeal.

Statement of Facts

The Appellant, Gustavo Passarelli, was charged along with the defendants, William H. Cleary and Jermone S. Healy in twelve counts of a 16 count indictment with having conspired with each other to violate Title 18 United States Code, Section 656 and Title 18 United States Code, Section 1014 in violation of Title 18, United States Code, Section 371 and with substantive violations thereof. Count 1 of the indictment is the conspiracy count; Counts 2 through 8, inclusive of the indictment allege substantive violations of

Title 18 United States Code, Section 556; Counts 9 through 12, inclusive of the indictment allege substantive violations of Title 18 United States Code, Section 1014. The Appellant was also charged in Counts 2 through 12, inclusive of the indictment with the crime of aiding and abetting.

In substance, the indictment alleges that the Appellant, Gustavo Passarelli and the defendant, Jerome Healy conspired together and with the defendant William H. Cleary, an Asst. Manager of the Barclays Bank of New York, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, to misapply the moneys, funds and credit of said bank and to make false statements of material facts upon applications for loans and financial statements for the purpose of influencing the action of said bank.

The Appellant Gustavo Passarelli was charged in Counts 2 through 8 inclusive of the indictment with aiding and abetting the defendant William H. Cleary with misapplication of bank funds with regard to seven \$5,000.00 loans made by the defendant William H. Cleary on behalf of the Barclays Bank of New York. The Appellant was also charged in Counts 9 through 12 inclusive of the indictment with making false statements of material facts upon applications and financial statements with regard to four loans

made by the Barclays Bank of New York.

Prior to trial the defendant Jermon F. Healy pleaded guilty. He testified as a government witness during the trial. The Appellant Gustavo Passarelli and the defendant William H. Cleary were tried together.

The Government's Case

WITNESS-JEROME F. HEALY

Jerome F. Healy is an attorney at law. In 1975, he was convicted of the crime of aiding and abetting in a bank embezzlement and was sentenced on October 31, 1975. He was named as a defendant in this case and entered a plea of guilty. He testified that he knows the defendant William R. Cleary and that he met him approximately three years prior when Mr. Cleary was working at the Chemical Bank in White Plains. At that time, Mr. Healy made two loans each totalling \$5,000.00 from the Chemical Bank through Mr. Cleary. (A-38-A-42).

Mr. Healy first met the Appellant Gustavo Passarelli in approximately June of 1974. In June or July of 1975, Mr. Healy had a conversation with the Appellant concerning the subject of borrowing money. Mr. Passarelli advised Mr. Healy that he had purchased certain property known as No. 1 Westchester Avenue in

*Refers to Appendix.

Port Chester, New York and that a mortgage which was on the property at that time was due in October of 1975 and that Mr. Passarelli was looking for the mortgage to be refinanced and that he needed some working capital until such time as the refinance could be put into effect. (A-42-A-43). Mr. Healy advised the Appellant that he knew some private people through whom he could perhaps arrange some private financing until such time as a mortgage transaction could be consummated. In August or September of 1975, Mr. Healy had another conversation with Mr. Passarelli about borrowing money. The mortgage on the property was in foreclosure and Mr. Passarelli told Mr. Healy that if he could obtain interim money from time to time he could adjourn the sale of the property and Mr. Passarelli wanted to know if Mr. Healy knew anyone who had money. Mr. Healy told Mr. Passarelli that he knew somebody at the Barclays Bank of New York from whom he had borrowed money in the past and that he could talk to him about lending some money to Mr. Passarelli. The Appellant told Mr. Healy that his credit rating was not of such a nature that he could borrow money and that he applied for a loan in another institution and the credit report indicated that there was a number of judgments against him and a tax lien. Mr. Healy told the Appellant that it would be difficult because of this credit rating to get a loan in his name and the Appellant told Mr. Healy

that although he didn't owe the Barclays Bank of New York any money he had banked with them previously and his reputation was not too good. (A-44-A-48).

Thereafter, the Appellant told Mr. Healy that his mother-in-law would qualify for credit and asked Mr. Healy whether he would be able to obtain a loan in her name, the proceeds of which would be used to keep the Marina going until such time as subsequent financing could be arranged. Mr. Healy told the Appellant that he would go to the bank and inquire. Thereafter, Mr. Healy spoke with the defendant William F. Cleary and told him in substance that he had a client who owned a Marina in Port Chester for whom he was trying to obtain permanent financing and that he thought that it could be a very profitable business but because of the shortage of money the Marina was not functioning properly and with an infusion of some capital he believed that the Marina could be successful. Mr. Healy also told Mr. Cleary that the name of the individual was Gustavo Passarelli and that he had banked at the Barclays Bank of New York at Port Chester but no longer banked with them and that he had some prior business failures and by reason of that he would not qualify for a loan but that his mother-in-law, Mrs. Mary Roccario certainly would qualify for credit. Mr. Cleary told Mr. Healy that he would process an installment loan for Mr. Passarelli's mother-in-law,

Mary Roccario, and if things worked out, he would make a loan to her for \$5,000.00 net. Mr. Cleary gave Mr. Healy an application which was, in effect, a financial statement which was to be filled in by the borrower. He also gave him an installment note. (A-49-A-50). Mr. Healy then brought the financial statement and note to the Appellant where Mr. Healy filled in the body of the financial statement from information which he discussed with the Appellant. The Appellant then signed his mother-in-law's name not only on the financial statement but on the installment note. Mr. Healy then brought the financial statement and note to the Barclays Bank of New York and submitted them to Mr. Cleary. A short time thereafter, Mr. Cleary advised Mr. Healy that he could approve the loan and he issued a check payable to Mary Roccario which check he gave to Mr. Healy.

On or about approximately October 20, 1975, Mr. Healy had a conversation with the Appellant concerning a loan for 8626 Realty Corporation. The Appellant said that he needed funds to forestall the foreclosure and he asked Mr. Healy if he knew any place where he could obtain money. Mr. Healy then told Mr. Passarelli that he would go to the Barclays Bank and see whether a loan of \$5,000.00 could be made to the 8626 Realty Corporation which was the record owner of the property. (A-60). Mr. Healy then met with Mr. Cleary and told him that the Appellant was in need of funds in order to

adjourn the foreclosure sale and that if he didn't obtain money for him the property might be lost. Mr. Healy submitted an appraisal of the property to Mr. Cleary which appraisal indicated that it had a value far in excess of the amount of the mortgage and that it would be in the best interest of Mr. Passarelli if he did not lose the property and lose the equity of the property. Mr. Cleary told Mr. Healy that Mr. Passarelli had a bad record with the Barclays Bank of New York and that he would lend the money but he would prefer that another officer other than Mr. Passarelli sign the corporate note in that capacity. Mr. Healy then called the Appellant from the bank and told him that he arranged a \$5,000.00 short term loan with the bank but that his signature was not to appear on the face of the note as corporate officer because of his reputation with the bank. The Appellant told Mr. Healy that there were other officers and that he should see him the following day to discuss it with him. Before Mr. Healy left the bank, Mr. Cleary gave him a financial statement that he wanted completed and a personal financial statement to be completed by the officer signing the note and also a bank resolution and short term time . The following day Mr. Healy and Mr. Passarelli met and Mr. Passarelli told Mr. Healy that a person by the name Carmine Liberatore was an officer of the corporation and that would sign the corporate note

as Vice President. Mr. Passarelli further told Mr. Healy that he had authority to sign his name. Mr. Healy then asked Mr. Passarelli questions about Mr. Liberatore and filled in the answers to questions on the bank application. Mr. Passarelli signed Mr. Liberatore's name to the application as Vice President. Mr. Passarelli also signed the financial statement as well as the note. Mr. Healy then delivered the documents to Mr. Cleary at the bank and either at that time or possibly the next day Mr. Cleary issued a bank money order payable to 8626 Realty Corporation which check was handed to Mr. Healy. Mr. Healy then delivered the check to Mr. Passarelli. Within the next week, Mr. Cleary contacted Mr. Healy and told him that he needed a financial statement of Mr. Liberatore. Mr. Healy told Mr. Cleary that he thought he had submitted one and Mr. Cleary said if he did it wasn't handy. Mr. Cleary gave Mr. Healy another financial statement to be filled in by Mr. Liberatore. Mr. Healy brought the financial statement to Mr. Passarelli and Mr. Healy filled in the financial statement with information that Mr. Passarelli gave him. Mr. Passarelli then signed Mr. Liberatore's name to the financial statement and Mr. Healy delivered it to Mr. Cleary at the bank. (A-64-A-65). The note of 8626 Realty Corporation had the signature of Mr. Liberatore as Vice President and it is personally endorsed on the back by the Appellant, Gustavo Passarelli.

On or about October 27, 1975, Mr. Passarelli had a discussion with Mr. Healy with a regard to a loan in the name of Westchester Avenue Marina. The Appellant was still having problems with the mortgagees on his property and needed additional financing. Mr. Healy told Mr. Passarelli that he would pursue another \$5,000.00 in the name of Westchester Avenue Marina, Inc. with the Barclays Bank of New York. (A-68). Westchester Avenue Marina, Inc. is a corporation which at the time was controlled by the Appellant and which operated the Marina at One Westchester Avenue. Mr. Healy went to the Barclays Bank of New York and spoke to Mr. Cleary and told him that Mr. Passarelli needed additional financing to keep creditors and the mortgagee from foreclosing or pursuing him any further. Mr. Cleary told Mr. Healy that he would be able to loan Westchester Avenue Marina, Inc. \$5,000.00 on a time basis and gave Mr. Healy a corporate note which was to be executed by Westchester Avenue Marina, Inc. The Appellant signed the note for Westchester Avenue Marina, Inc. and Mr. Healy brought the executed note to Mr. Cleary who subsequently had the bank issue a money order payable to Westchester Avenue Marina, Inc. in the sum of \$5,000.00. Mr. Healy brought the \$5,000.00 check to Mr. Passarelli. The note offered in evidence was a \$4,000.00 note as a prior note in the sum of \$5,000.00 was at some time subsequent to the loan reduced by a payment of \$1,000.00 and the note offered in evidence was a renewal

note one month later for \$4,000.00. Mr. Healy testified that the corporate resolution that was executed in order to secure the loan was signed by Mr. Passarelli but that he signed the name of Carmine Liberatore. That corporate resolution was placed in evidence by the Government as Exhibit No. 12. Also, in connection with said loan, Mr. Healy gave Mr. Cleary a financial statement of Westchester Avenue Marina, Inc. consisting of a balance sheet as of August 31, 1975 and a statement of operation for six months ending August 31, 1975. He was given this balance sheet and operating statement by Mr. Passarelli. The balance sheet and operating statement were admitted in evidence without objection as Government Exhibit No. 9.

On or about November 12, 1975, Mr. Healy had a conversation with the Appellant concerning a loan in the name of Carl French. Mr. Passarelli told Mr. Healy that he was in desperate need of money to keep the property from being foreclosed and asked whether Mr. Healy could arrange any finance for him. The Appellant told Mr. Healy that he had a friend, Carl French, who had worked for him in the past and with whom he had done business and the Appellant asked whether or not he could obtain a loan for this person. The Appellant told Mr. Healy that French would be willing to sign a note with the bank and that if he received a bank loan he would pay back to Mr. Passarelli the money he owed him. Mr. Healy told Mr. Passarelli

that he would go to the Barclays Bank of New York and ascertain if the bank would lend such an individual money. Thereafter, Mr. Healy met with Mr. Cleary and asked him whether the loan could be made to Carl French. Mr. Cleary told Mr. Healy he may be able to do it and he gave Mr. Healy bank forms consisting of an application and an installment note to be filled in and returned to him and he could process the application. (A-77). Mr. Healy brought the documents to the Appellant and Mr. Healy filled in the application with information he received from the Appellant. Mr. Passarelli told Mr. Healy that he had authority to sign the name Carl French and he did so on the completed financial application. The documents were brought by Mr. Healy to Mr. Cleary who accepted them and sometime later issued a check payable to Carl French. Mr. Healy gave a check in the sum of \$5,000.00 to Mr. Passarelli. Thereafter, Mr. Cleary told Mr. Healy that he needed an application signed by Carl French as he didn't have any in his possession and would Mr. Healy please have another application executed. Thereafter, Mr. Healy met with Mr. Passarelli who gave Mr. Healy information concerning Carl French. The application was filled out and Mr. Passarelli signed Mr. French's name to it. This application was brought back to the Barclays Bank of New York by Mr. Healy and given to Mr. Cleary by Mr. Healy. Mr. Healy also testified that the endorsement on the

back of the note, Carol French, was made by the Appellant in the presence of Mr. Healy.

On approximately November 12, 1975, Mr. Healy had a conversation with Mr. Cleary concerning the loan in the name of Joseph or Giuseppe Passarelli. Mr. Healy told Mr. Cleary that he had a conversation with the Appellant the day before or the same day and that the Appellant told him that there would be an auction of the property held on November 13th and that unless he could raise approximately \$9,000.00 he would lose the property to a third party.

Mr. Cleary agreed to make the loan and gave Mr. Healy a check for \$5,000.00 payable to Joseph Passarelli and also applications for a loan to be completed by Giuseppe Passarelli and a note to be signed by Giuseppe Passarelli. At that time, Mr. Healy had not submitted any financial applications to him or any loan applications to him on behalf of Mr. Giuseppe Passarelli. Mr. Healy took the \$5,000.00 check and the note that was given him by Mr. Cleary and went to the County Court House in White Plains where the foreclosure was taking place. The Appellant introduced Mr. Healy to his brother, Giuseppe Passarelli and Mr. Healy told Giuseppe Passarelli that he had arranged a \$5,000.00 loan for him which he in turn was going to loan or lend to his brother and that certain documentary evidence had to be given to the bank so that a credit

check could be run on him and that a note evidencing a loan would have to be submitted to the bank. At that time the application for a loan was filled in, signed by Joseph Passarelli and a note in the sum of \$5,000.00 was signed by him. Subsequently, Healy brought the note and financial application to Mr. Cleary at the Barclays Bank of New York (A-85-A-86). The check in the sum of \$5,000.00 had previously been turned over to Joseph Passarelli who endorsed the back of the check and turned it over to the Court appointed referee in the foreclosure action.

On approximately November 28, 1975, Mr. Healy and the Appellant had a conversation relating to a loan to Thomas Powers. The Appellant told Mr. Healy that he had to cover certain expenses and that he had a friend of his, Thomas Powers, who worked for him in the past and to whom he had sold a boat and that Mr. Powers had not yet paid for the boat. The Appellant asked whether Mr. Healy could arrange an installment loan at the Barclays Bank of New York for Thomas Powers. Mr. Healy spoke to Mr. Cleary at the bank and was given certain forms. Mr. Healy had told Mr. Cleary the conversation he had with the Appellant and that the Appellant had sold Mr. Powers a boat and that if a loan was made to Mr. Powers he could pay for the boat. Mr. Cleary gave certain documents to Mr. Healy which were delivered to the Appellant. Thereafter,

Mr. Healy picked up the completed documents from Mr. Passarelli and brought them to Barclays Bank and delivered them to Mr. Cleary. Mr. Cleary then gave Mr. Healy a check in the sum of \$5,000.00 payable to Thomas Powers. The government then introduced in evidence Exhibit No. 23 which is an application for personal credit which he had given to the Appellant and picked up from the Appellant after the application was completed. This completed application was turned over by Mr. Healy to Mr. Cleary at the bank. The government then introduced into evidence Exhibit No. 24 which is an installment note and security agreement which Mr. Healy had received from Mr. Cleary and had given to the Appellant. The Appellant later turned over the completed documents to Mr. Healy who in turn delivered them to Mr. Cleary. The government then introduced Exhibit No. 25 which is a \$5,000.00 check made payable to Thomas Powers. Mr. Cleary had given this check to Mr. Healy who in turn gave the check to the Appellant. At the time the loan was made to Thomas Powers no chattel mortgage agreement was executed. (A-89-A-93).

On approximately December 15, 1975, Mr. Healy had a conversation with the Appellant concerning a loan to be in the name of Westchester Avenue Used Cars, Inc. The Appellant told Mr. Healy that he was in desperate need of money and that if he were unable to obtain it everything was going to go under. The Appellant told Mr. Healy that he had a corporation which operated on a minor scale in the used

car business and asked Mr. Healy if he would be able to get a loan for that corporation. Mr. Healy told the Appellant that he would try. Mr. Healy then met with Mr. Cleary and told him that Mr. Passarelli had a corporation which operated on a minor scale in the used car business and that the Appellant needed certain money to continue operating the Marina and Mr. Healy asked Mr. Cleary if the bank would loan \$5,000.00 to Westchester Avenue Used Cars, Inc. Mr. Cleary gave Mr. Healy a note to be executed by Westchester Avenue Used Cars., Inc. and said that if he could get it executed, he would give the loan. (A-95). Mr. Healy brought the note to the Appellant who signed it. Mr. Healy then brought the note back to the bank, gave it to Mr. Cleary. A bank check in the sum of \$5,000.00 was then issued payable to Westchester Avenue Used Cars, Inc. Mr. Healy delivered the check to the Appellant (A-95-A-96). The note was signed by the Appellant as President of the corporation and was personally endorsed on the back by the Appellant. Mr. Healy further testified that he never told Mr. Cleary at any time during the times he was making these loans that he was making a mistake in making these loans and that he did everything he could to reassure Mr. Cleary that he was acting properly in making these loans. (A-105). On cross examination, Mr. Healy testified with regard to the loan to 8626 Realty Corp. that the loan was made to 8626 Realty

Corp and the financial statement that was submitted was that of Carmine Liberatore. Further, Carmine Liberatore did not make an application for a personal loan and no loan was obtain for Mr. Liberatore personally (A-107-A-108).

WITNESS--EDWARD C. FLANAGAN

Mr. Flanagan is employed at the Barclays Bank of New York and has been in their employee for 26 years. He is a Vice President and Senior Regional Loan Officer. In September of 1975, he was employed at the New Rochelle branch at 491 Main St., New Rochelle, New York and was Vice President and manager of that branch. In September, 1975, the defendant Cleary was also employed at that branch as an Assistant Manager. Mr. Flanagan held the same position in the New Rochelle branch through December of 1975. During September through, December, 1975, the defendant Cleary had a limit on the amount of a loan he could approve without getting the approval of another bank officer. That limit was \$5,000.00 (A-13-A-16). Mr. Flanagan testified as to the procedures a bank officer would follow if an individual would come into the bank requesting a loan. He also described the difference between an installment loan and a time loan.

Some time around December 22, 1975, Mr. Flanagan had a discussion with Mr. Cleary concerning certain loans he had approved. The

bank discovered at that time that some of these loans were made to an individual or a corporation controlled by an individual with whom the bank had certain credit problems in the past, namely the Appellant, Gustavo Passarelli. (A-17-A-19). The witness was then shown Government's Exhibit No. 47 for identification and testified that it is a charge off loan report which is a report that is made out when the bank has reached the point where it cannot collect the loan and therefore must write it off as a loss. Government's Exhibit No. 47 was offered in evidence and admitted without objection. The name of the borrower was Thomas Powers and Carol Ann Powers. The same procedure was followed for charge off loan reports for 8626 Realty Corp. which was admitted as Government Exhibit No.49; Westchester Avenue Marina, Inc. which was admitted as Government Exhibit No. 50; Carl French which was admitted as Government Exhibit No. 51; Giuseppe Passarelli which was admitted as Government Exhibit No. 52; Westchester Avenue Used Cars, Inc; which was admitted as Government Exhibit No. 53. (A-20-A-26). Mr. Flanagan testified that during his 26 years at the bank he had heard of the name Gustavo Passarelli and he knew that he had done business with the bank and that the bank had loaned him money. The witness was then asked on cross examination by Counsel for Appellant whether he knew that as a matter of fact the bank had loaned the Appellant money from 1955 through 1973.

The Court interrupted the cross examination by Appellant's Counsel. A discussion was had outside the hearing of the jury at which the Court ruled that it would not permit examination concerning offers made by the Appellant to repay any of the loans and/or pledge his collateral as security for the loans; offers made by any of the named borrowers to repay the loans; whether any of the named borrowers admitted or denied liability for repayment of the loans. Counsel for Appellant stated that the evidence as to the Appellant's offers to repay and collateralize the loans was offered on the question of his intent to injure or defraud the bank. Evidence with regard to whether the named borrowers made offers to repay and whether they admitted or denied liability was offered on the question of who was the borrower as the government contended that in all cases the Appellant was the borrower. (A-27-A-37, A-98-A-102, A-103-A-104, A-235).

WITNESS--CARL FRENCH

Mr. French testified that he knows the Appellant between 10 to 12 years. The Appellant asked Mr. French if he could use his name to get a loan and Mr. French said that he could because the Appellant had done the same for him before. (A-109). Mr. French was then shown an application for personal credit from the Barclays Bank of New York (Government Exhibit No. 15). He testified that it

looked like his signature but he doesn't know if he signed it, he doesn't remember. He was then shown Government Exhibit No. 15A, which is also an application for credit from the Barclays Bank of New York and he testified that he did not sign that. He further stated that with regard to the proceeds of the loan, he received the check and signed the check and gave the check to the Appellant. That he had nothing to do with actually obtaining the loan. He also stated that he could not recall filling out any application of personal credit with the Barclays Bank. He testified that many of the items on the financial application were erroneous, such as the fact that he was not married to someone named Carol and that he was not a full time employee of Westchester Avenue Marina, Inc. (A-111-A-112). He testified that he did not purchase an automobile from the Appellant (A-113). Carl French testified that since he had given the \$5,000.00 he acquired as a result of the loan to the Appellant, he had need of some money. The Appellant advised him that he would like to help him, but he needed money himself for his mortgage and said that if somebody will sign for him the Appellant would give it to his lawyer and get him a loan. Carl French then asked a friend of his if he could use his name. That individual was Thomas Powers. Carl French then filled out a loan application in the name of Thomas Powers. He had a discussion with Mr. Powers about the information on the loan application and was told to do

whatever he wanted to so do long as he didn't get stuck paying. Mr. French testified that he did not have discussion with Mr. Powers about the information that he was putting down on a loan application. Mr. French took the loan application and left it on a desk at Appellant's marina. He left it on the Appellant's desk. He did not have any discussion with the Appellant concerning the application and about the loan proceeds from that application. Thereafter, the Appellant gave the check to Mr. French. Mr. French took the check signed it and took half the money. He gave the other half of the money to the Appellant. Carl French testified that he filled out the application for personal credit (Government Exhibit No. 23) in the name of Thomas Powers (A-114-A-116). Mr. French then was shown Government Exhibit No. 24 which is an installment note and security agreement in evidence and he testified that he did not recall filling it out and that the signature on it which said Thomas Powers does not look like he had signed Thomas Powers. (A-117). He was then shown Government Exhibit No. 25 in evidence which is the Barclays check in the name of Thomas Powers and he testified that that was the check that was given him by the Appellant and that he signed the name Thomas Powers to it. (A-118). Mr. French testified that he did not recall signing his own loan application. He further testified that he spoke to Mr. Healy but did not meet him in person, having spoken to him over the telephone. He stated that Mr. Healy

asked him certain questions and that he gave certain information to Mr. Healy for the bank. The questions asked concerned his earnings; marital status; where he worked; how much he earned; whether he had a personal bank account; whether he was paying rent or money on real estate; whether he owed any money and similar questions. Carl French did not remember the exact questions, but testified that the answers he gave to Mr. Healy were truthful. He further testified that some of the questions that appear on the loan application, Government Exhibit No. 15, were some of the questions he was asked by Mr. Healy. He stated that the Appellant never asked him any questions but simply put him on the phone with Mr. Healy. With regard to the Thomas Powers loan, Carl French testified that he filled out the application in the name of Thomas Powers but that he didn't discuss any of the information with Mr. Powers. The only information that Thomas Powers gave to Carl French was his social security number. Carl French did not tell the Appellant that he did not get any of the information from Mr. Powers. He did not tell the Appellant that he filled out the application in Mr. Powers name. He doesn't recall telling the Appellant that the information on Thomas Powers application was false and he doesn't know if the Appellant read the application. Carl French did not tell Mr. Passarelli that he signed Thomas Powers name to the application. (A-119-A-129). Mr. French testified that he did not tell anything

to the Appellant from which he could determine there was anything false on the financial statement. He just filled it out and put it in an envelope, went over to the Marina, and said "I have an application from Thomas Powers". The Appellant said leave it on my desk, I'm busy, leave it on my desk, I'll give it to the lawyer (A-129-A-130).

WITNESS--THOMAS POWERS

Mr. Powers testified that he never took out a loan with the Barclays Bank of New York nor did he ever purchase a boat from the Appellant. His testimony was to the effect that all the financial and marital information on the loan application was inaccurate, that he had never seen, nor signed the loan application, the note of the Barclays Bank of New York or the check in the sum of \$5,000.00. He further testified that in the fall of 1975, he did not receive a telephone call from Carl French asking permission to fill out an application in his name, nor did he know that an application had been completed for a loan in his name. (A-131-A-135).

WITNESS--ROBERT CONFORTI

Mr. Conforti is a special agent with the Federal Bureau of Investigation and was assigned in late 1975 or 1976 to investigate various allegations concerning the loans at Barclays Bank of New York.

On March 10, 1976, Mr. Conforti interviewed the Appellant. The Appellant told Mr. Conforti that Mr. Healy had informed him that he had an individual at Barclays Bank of N. Y. where he thought he could obtain loans for Mr. Passarelli. The Appellant indicated to Mr. Conforti that Mr. Healy told him he would have to get a certain amount of the proceeds from each loan because he had to take care of the individual who was making the loan. The Appellant also told Mr. Conforti that although Mr. Healy made the statement, he felt that Mr. Healy was just so to speak, blowing off steam and wasn't actually kicking back any money to the individual making the loans in the bank. With regard to the loan made in the name of 8626 Realty Corporation, the Appellant advised Mr. Conforti that Mr. Carmine Liberatore was once an officer of that corporation, however, he was no longer an officer at the time of the loan. (A-136-A-148).

The Appellant told Mr. Conforti that with regard to the Thomas Powers loan, Thomas Powers had purchased a boat from him. The Appellant showed Mr. Conforti a boat and told him that was the Power's boat, and that Mr. Powers had not picked the boat up as yet. The Appellant also told Mr. Conforti he had given Mr. Healy \$800.00 for obtaining the Powers loan, that as Mr. Healy said this loan was more difficult to obtain than the others, he wanted an additional \$800.00. The Appellant refused to give Mr. Healy any more money

and gave all of the proceeds of that loan back to Mr. Healy and told Mr. Healy to go to the Barclays Bank of New York, pay off the loan in full and clear Mr. Power's name. The Appellant then showed Mr. Conforti a check payable to Thomas Powers around \$5,000.00. On the check was marked refund for boat. The check had not been negotiated. The check was placed in evidence as Government Exhibit No. 44. The Appellant conceded that the check had not been negotiated.

Mr. Conforti discussed the loan made to Westchester Avenue Used Cars, Inc. with the Appellant. The Appellant told Mr. Conforti that although the loan was taken out in the corporate name, Westchester Avenue Used Cars, Inc; the loan was suppose to be paid back by Mr. Healy. The Appellant also told Mr. Conforti that the proceeds from this loan was given to Mr. Healy to go to Barclays Bank of New York to repay the Thomas Power's loan.

The Appellant also told Mr. Conforti that in almost every instance, Mr. Healy doctored up the loan applications so that they would be passed on by the individual at Barclays Bank of New York who was making the loans. The Appellant further stated he could never have gone to Barclays Bank of New York himself and obtain any of the loans without the assistance of Mr. Healy.

Mr. Conforti interviewed Mr. Carl French on approximately March 4, 1976. During the interview, Mr. French did not tell

Mr. Conforti that he had spoken to Mr. Healy and had given Mr. Healy truthful information about his background and personal assets, family history and other types of things that would be on a bank loan application. Mr. Conforti interviewed Mr. Carl French again on approximately August 6, 1976. This time about the Thomas Power's loan. During that interview Mr. French did not tell Mr. Conforti that he had a conversation with Jerome Healy during which he gave Jerome Healy truthful information about the background, family history, personal assets and other types of things that might be expected on a loan application for Thomas Powers (A-148-A-151). However, the interview was basically a question and answer interview and the questions weren't asked. (A-152).

Mr. Conforti testified that the Appellant did not tell him when he discovered that Mr. Healy altered the applications that had been submitted to the bank (A-154).

WITNESS--CARMINE LIBERATORE

Mr. Liberatore was shown Government Exhibit No. 4 in evidence which is a financial statement in the name of Carmine Liberatore and Government Exhibit No. 5 in evidence which is another financial statement in the name of Carmine Liberatore. He testified that neither document was in his hand writing and that he had seen neither document prior to there being shown to him by the FBI. He

was then shown Government Exhibit No. 6 in evidence which is a Barclays Bank of New York check in the sum of \$5,000.00 payable to the order of 8626 Realty Corp. He testified that he had never seen the check. He was then shown Government Exhibit No. 7 in evidence which is a note from the Barclays Bank which contains a signature purporting to be that of Carmine Liberatore. He testified that it was not his signature. He also testified that he had never seen the note prior to it being shown to him by an FBI agent. (A-155-A-157). Mr. Liberatore also stated that the information on the financial statement was incorrect. He further testified that he had never been an officer of 8626 Realty Corporation (A-158). He testified that he did not give the Appellant authorization to use his name on a loan application, nor did the Appellant ever ask him for his permission to use his name on a loan application. (A-157).

WITNESS--THOMAS SAVOCA

Mr. Savoca has been employed by the Barclays Bank of New York for approximately 18 years. He has worked in the installment loan department since 1973. The witness testified as to the meaning of the work "floor planning" and the fact that when floor planning automobiles the borrower is obligated pursuant to the agreement that when he sells a particular car he must pay the bank immediately the proceeds of the sale of that car. (A-160). In the early part of 1973, Mr. Savoca had a conversation with the Appellant in which

he advised the Appellant that it would be necessary to curtail his floor planning arrangement with the bank. The bank indicated to the Appellant that it would no longer do any business and requested that as the Appellant sold vehicles the bank would be required to be paid in full on each particular vehicle. In March of 1973, the bank checked the vehicles of the Appellant and came to the conclusion that he was 'but of trust'. This meant that some of the vehicles were not located on the Appellant's premises. (A-163).

Mr. Savoca testified that he knew the Appellant since 1972 and that the name of the company for which the Barclays Bank of New York had been floor planning was Westchester Recovery. In December of 1973, the bank discovered that five vehicles were not on the premises. However, they had not been sold. On January 9, 1974, the bank demanded that Mr. Passarelli pay off all the loans. This meant that the bank wanted the floor planning paid off whether or not the Appellant sold any of the cars. On January 9, 1974, the Appellant paid the Barclays Bank of New York in full. (A-168).

When the Government rested, the Appellant made a motion for Judgment of Acquittal (A-169-A-177).

The Defense Case

WITNESS-WILLIAM H. CLEARY

Mr. Cleary testified that he commenced work at the Barclays Bank of New York approximately February, 1975. He testified that his credit line for Barclays Bank of New York was \$5,000.00 for unsecured and \$10,000.00 or \$15,000.00 secured (A-179). This meant he could make a loan of \$5,000.00 unsecured within his judgment without any collateral security and grant a loan for \$10,000.00 or \$15,000.00 with collateral such as marketable security, passbook, treasury bills, bonds, whatever is a marketable security. With regard to the loan made to 8626 Realty Corporation, Mr. Healy testified that he received an individual financial statement, the note and resolution. Mr. Healy stated that the corporate resolution was executed so that he could see who signed for the corporation. (A-180-A-181).

Mr. Cleary was shown Government Exhibits Nos. 23, 24, 25 and 26 which are the documents on the Powers' loan. He stated that he received Exhibits Nos. 23 and 24 which are the installment loan application and the note. Thereafter, he proceeded to make out Government Exhibit No. 25 which is a check in the sum of \$5,000.00 payable to Thomas Powers. (A-182).

In the middle of December, at the instruction of the bank to

collect the proceeds of the loan, Mr. Cleary went to the Appellant's place of business in Port Chester and informed him that he needed complete payment on all the loans that he had granted through Mr. Healy. One of the loans in questions was the one to Thomas Powers who Mr. Healy was informed worked for Mr. Passarelli. At that time, the witness gave Mr. Passarelli a security agreement, Government Exhibit No. 26, which was to secure a boat that was to be used. The boat was the reason for the loan (A-183). The loan was an unsecured loan when it was first made. The bank asked Mr. Cleary to fully collateralize the loan or receive full payment for the loans. For that reason he had the security agreement executed on the Power's loan in December (A-183).

The witness was then shown Government Exhibit Nos. 27 and 28, which related to the loan made to Westchester Avenue Used Cars, Inc. He testified that the loan was made approximately on December 15th. Mr. Healy stated that the corporation required working capital for an upcoming auction for used cars. The loan would be made on a short term note (A-185).

Mr. Cleary testified that he believed Mr. Liberatore had made an application for a personal loan but that the loan was never granted (A-186).

WITNESS--JULIA RABASCA

Miss Rabasca is an employee of the Barclays Bank of New York and has been at the Rye office since 1961. She currently holds the position of Assistant Cashier and Manager and has held that position for approximately eight years (A-187-A-189). She testified that she knew the Appellant since 1972 and that from 1972-1973 she loaned money to the Appellant and various of his corporations and also loaned money to individuals for whom the Appellant co-signed. In the years 1972 and 1973 she approved totalled loans made by the bank to the Appellant, his various corporations and individuals for whom he cosigned in the amount of \$20,000.00 to \$25,000.00. The Appellant repaid all the money he borrowed as well as the money borrowed by his corporations and by individuals for whom he co-signed when said individuals defaulted in the repayment of their loans. (A-189-A-190).

She testified that if a lending officer has a loan limit of \$5,000.00 per loan he is not restricted from loaning \$5,000.00 to various different corporations which happened to be owned by one individual. (A-191). The witness was then shown Government Exhibit No. 5, a financial statement of Carmine Liberatore and was asked whether this was an application or a request for a loan. She answered no, this a personal financial statement. She further testified

that government Exhibit No. 5 does not indicate that 8626 Realty Corporation had applied for a loan. (A-192-A-193).

WITNESS-GUSTAVO PASSARELLI

Mr. Passarelli testified that he owned all of the stock of 8626 Realty Corp. The Appellant testified that he had over \$100,000.00 invested in 8626 Realty Corp. (A-194). In July, 1975, the Appellant advised Mr. Healy of the fact that he was having problems with his real estate, namely the property owned by 8626 Realty Corp. (A-197-A-198). The Appellant told Mr. Healy that he needed \$21,000.00 as his mortgage was in default in the sum of \$15,000.00 and he needed \$6,000.00 for lawyers fees and incidentals (A-198). Mr. Healy suggested that if he obtained a loan for the Appellant in the amount of \$35,000.00 could he get by for a few months. The Appellant said that he could get by until October. Mr. Healy said that at the end of October he would try to get the Appellant a long term mortgage of \$125,000.00. (A-199). Thereafter, Mr. Healy advised the Appellant that an individual named Walter Steele would loan him \$35,000.00. In August, 1975, the Appellant gave a copy of his deed to Mr. Healy so that he would be able to draw a second mortgage to secure the loan made by Walter Steele. Mr. Healy asked Mr. Passarelli to sign the mortgage before he could get the money. The Appellant stated that he won't sign the mortgage

until he got the money (A-201). Mr. Healy asked the Appellant how much money he needed immediately and the Appellant said at least \$15,000.00. Mr. Healy told the Appellant that he was going to borrow some money. The Appellant asked Mr. Healy why he had to borrow money if he had \$32,000.00 from Mr. Steele. Mr. Healy advised the Appellant that one of his clients was in jail and he put up a \$50,000.00 cash bond and the he used Mr. Steele's money. He told the Appellant that he was worried about it because Mr. Steele didn't know what he had done. Thereafter, Mr. Healy gave Mr. Passarelli \$10,800.00 (A-202-A-203). Thereafter, Mr. Healy suggested to the Appellant that he apply for a loan to the Barclays Bank of New York. The Appellant advised Mr. Healy that he did not want any part of the Barclays Bank of New York as he just finished paying his last payment in August on outstanding loans and he did not want to borrow money again from the Barclays Bank of New York. He also testified that he did not believe that he had bad credit with the bank and that he had never been denied a loan from Barclays Bank of New York. Thereafter, Mr. Healy suggested that perhaps the Appellant's relatives might go into the Barclays Bank of New York and apply for a loan so that the Appellant would not have to be bothered. At that time, the Appellant suggested his mother-in-law banks at the Barclays Bank and she had a number one credit at the Barclays Bank of New York. With regard to the loan

made to 8626 Realty Corporation, Mr. Healy asked the Appellant who owned the property, at which the Marina was operated. The Appellant advised Mr. Healy that the name of the corporation was 8626 Realty Corporation and that at the time the corporation was organized Carmine Liberatore was the Vice President. Mr. Healy suggested that they use 8626 Realty Corp. to get a loan from Barclays Bank of New York and said to the Appellant, don't worry about it, I will take care of this loan.

The Appellant advised Mr. Healy that there was an individual in White Plains, who had offered him \$150,000.00 mortgage to pay off everything and that Mr. Healy stopped him from taking the loan as he had to protect Mr. Walter Steele's \$35,000.00. Mr. Healy told Mr. Passarelli that he will get him out of this mess cheaper than White Plains. Mr. Healy asked the Appellant to give him the opportunity as he did not want to ruin his friendship with Walter Steele, and that he would help the Appellant raise the funds because he made a mistake and he had to get out of this mess. (A-208). In the meantime, Mr. Healy kept asking the Appellant to sign a second mortgage for Mr. Steele on the property of 8626 Realty Corp. (A-208-A-209). Thereafter, Mr. Healy called the Appellant and discussed his obtaining a \$5,000.00 loan for 8626 Realty Corp. Mr. Healy asked the Appellant who the officers of the corporation were and the Appellant responded that he was the President of the

corporation and Carmine Liberatore was the Vice President. Thereafter, the Appellant met with Carmine Liberatore and asked him whether he could use his name as Vice President of the corporation. Mr. Liberatore told the Appellant he doesn't care as long as it wouldn't cost him anything. The following day, Mr. Healy came to the Appellant's office and the Appellant gave Mr. Healy a financial statement on 8626 Realty Corp. The Appellant was then shown Government Exhibit No.4 and 5 which are financial statements purportedly of Carmine Liberatore. The Appellant testified that he signed Mr. Liberatore's name to these two documents and that he received the documents from Mr. Healy and signed them in blank. When the Appellant signed the financial statement in blank he let it be known to Mr. Healy that the money was to be borrowed by the corporation not by Mr. Liberatore. Prior to obtaining the loan for 8626 Realty Corp. the Appellant had never seen Government Exhibits No.4 and 5 filled out. The Appellant did not tell Mr. Healy the information that appeared on those statements (A-212). Mr. Healy did not tell the Appellant that he was going to prepare a financial statement for Mr. Liberatore. He thought he was signing an application for a loan for 8626 Realty Corp. (A-213). The Appellant was then shown Government Exhibit No. 7 in evidence which is the note of 8626 Realty Corporation. He testified that he signed the

name Carmine Liberatore to the note and that he also signed his own name as a personal endorser on the back of the note. (A-214). With regard to the loan made to Thomas Powers, the Appellant testified that Carl French said to him that they were both in trouble and asked him whether he could get a loan for Thomas Powers if Tom would help Carl French and sign. The Appellant told Carl French he would find out. At that time there was no discussion with regard to a boat being used as collateral for Mr. Power's loan. Some time later on Mr. Cleary came to see the Appellant and the Appellant advised Mr. Cleary that he could use one of his boats as collateral for the Power's loan. The Appellant does not recall whether he discussed putting up a boat for collateral for Thomas Powers prior to the loan being made or after the loan being made (A-226-A-227). The Appellant was shown Government Exhibit No. 23 in evidence which is an application for a loan for Thomas Powers. He testified that he never read the application. He was then shown Government Exhibit No. 24 which is a note and security agreement and he testified that he never read that note or security agreement. (A-227-A-228). He was then shown Government Exhibit No. 25 which was a check in the amount of \$5,000.00 and was asked whether he deposited that in the account of Westchester Avenue Marina. The Appellant testified that he did. He further testified that he did

not see who signed the name Thomas Powers on the back of the check but that he had given the check to Carl French, and he did not see anyone sign the name on the back of the check. Of the proceeds of the check \$2,000.00 was paid to the Appellant, \$2,000.00 went to Carl French to pay his debt and \$200.00 went to Thomas Powers and \$800.00 was paid to Mr. Healy. Thereafter, Mr. Healy asked the Appellant for an additional fee for obtaining the loan as it was difficult loan to obtain. The Appellant then stated that he gave Mr. Healy \$4,200.00 and told him to pay off the Thomas Power's loan (A-228-A-229).

With regard to the loan of Westchester Avenue Used Cars, Inc., the Appellant stated that he did not sign any documents to obtain that loan and he does not know how Mr. Healy obtained the loan. He did not sign an application nor did he sign a financial statement, nor did he submit a financial statement (A-229-A-230). The Appellant was then shown Government Exhibit No. 27 in evidence which is a \$5,000.00 note made out to Westchester Avenue Used Cars, Inc. and signed with the name Gus Passarelli. He testified that he signed the note. He was then shown Government Exhibit No. 28 which is a check of the Barclays Bank of New York made payable to Westchester Avenue Used Cars, Inc., in the sum of \$5,000.00 and he stated that he endorsed the back of that check and deposited the check in the account of Westchester Avenue Marina. (A-230).

The counsel for the Appellant then attempted to ask questions concerning whether any of the loans had been repaid and whether there had been any negotiations by the Appellant to repay any of the loans. The government objected and the court sustained the objection (A-235).

On cross examination by the government the Appellant was asked whether Mr. Healy told him that he had to pay money to the bank official in connection with the loans. The Appellant testified that he had to pay Mr. Healy lawyers fees to arrange the loans. (A-237). Mr. Passarelli testified that he did not know that Mr. Healy had to be filing false loan applications with the Barclays Bank of New York in order to obtain these loans (A-238). The Appellant rested and after the Government rebuttal, made a motion for Judgment of Acquittal. (A-239).

INSTRUCTIONS

The Appellant submitted a requested instruction on offers to repay made by the Appellant as those offers to repay relate to his intent to injure or defraud the bank. The Court rejected this requested instruction (A-236, A-241).

The Appellant submitted a requested instruction on "Materiality" of a false statement as it relates to the Appellant's intent to knowingly make a false statement to influence the Barclays Bank of New York. The Court rejected the requested instruction (A-240, A-242).

POINT NO. 1

THE DISTRICT COURT ERRED IN RULING
INADMISSIBLE EVIDENCE OFFERED BY
THE APPELLANT TO SHOW HIS OFFERS TO
REPAY AND SECURE THE DEBTS DUE TO
THE BARCLAYS BANK OF NEW YORK

Counts two through eight inclusive of the indictment charged the Appellant with aiding and abetting the defendant, William R. Cleary, a bank officer of the Barclays Bank of New York, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, in misapplying the moneys, funds and credits of the bank in violation of Title 18 United States Code, Section 656 and 2. The jury returned a verdict of guilty on counts 3,4,5,7 and 8 but the District Court reversed the verdict on Counts 3, 4 and 5 because the jury found the defendant William R. Cleary, not guilty on those counts.

The Appellant offered evidence to prove that he made offers to repay the money borrowed and to secure the indebtedness with collateral. The District Court ruled the offered evidence inadmissible although offered on the issue of the Appellants intent to injure or defraud the bank.

Intent to injure, defraud or deceive the bank is an essential element of the offense of misapplication by a bank officer of money, funds or credits of the bank. In the case of an individual charged as an aider and abettor, not only must the bank officer be shown

to have the necessary intent to injure or defraud the bank, but the government must also prove that the individual charged with aiding and abetting had a similar intent. United States v. Docherty, 468 F. 2d. 989 (2d Cir. 1972); United States v. Giordano, 489 F. 2d. 327 (2d Cir. 1973); Evans v. United States, 153 U.S. 584, 14 S. Ct. 934 (1894); United States v. Fortunato, 402 F 2d. 79 (2d Cir. 1968).

In many ways the case at bar is similar to the case of United States v. Matot, 146 F. 2d. 197 (2d Cir. 1944); where the Court held that the defendant's testimony as to his conversation with the president of the bank wherein he volunteered to sacrifice his real property in order to meet his overdraft was competent upon the question of the defendant's intent to defraud the bank. In the Matot case, supra; the question of the defendant's intent was of supreme importance because of the closeness of the case. The question of intent is also crucial in the case at bar. The jury found the Appellant not guilty as to counts 2 and 6. The jury found the banker, Cleary, not guilty on counts 2 through 5 inclusive. The only two counts of counts 2 through 8 inclusive where the jury found both the Appellant and defendant Cleary guilty are counts 7 and 8. It is evident from the foregoing that the jury was giving careful consideration to the intent of the Appellant

and Cleary to injure and defraud the bank. The testimony during the trial was that the defendant Cleary didn't get any money out of the alleged misapplication of bank funds. The Court stated that the fact that Mr. Cleary didn't get any money makes it one of the most baffling episodes (A-177-A-178). In the Matot case, *Supra*, the Court said that the cashier's own defalcations were also curious; "it remains totally inexplicable why he should have accommodated his friends without any ascertainable profit to himself and at great risk. For these reasons any evidence of Matot's good faith was highly important". The same reasoning was applied in the case of United States v. Wicoff, 187 F. 2d. 886 (7th Cir. 1951) where the Court reversed the defendant's convictions because the District Court denied the defendant the opportunity of proving restitution. The Court, quoting the case of United States v. Matot, *Supra*, said that the evidence should have been admitted on the issue of the defendant's intent to injure or defraud the bank. It is true that if a crime has been committed restitution does not wipe out the crime. However, financial responsibility and repayment are material considerations on the issue of intention to defraud Seals v. United States, 221 F. 2d. 243 (8th Cir. 1955); United States v. Sorensen, 330 F. Supp. 642; (D.C. Mont. 1971).

For the reasons cited in the foregoing decisions the Appellant's conviction on Counts 7 and 8 of the indictment should be reversed.

POINT NO. 2

THE DISTRICT COURT ERRED IN
REJECTING THE APPELLANT'S
REQUESTED INSTRUCTION ON OFFERS
TO REPAY AS PROBATIVE ON THE
APPELLANT'S INTENT TO INJURE OR
DEFRAUD THE BANK.

Through the witness Edward C. Flanagan, the government introduced Government Exhibits 47 through 55 in evidence. These exhibits are charge off loan reports of various loans allegedly made to the Appellant. They relate to the loans set forth in Counts 2 through 8 inclusive of the indictment. Certain of these exhibits have statements regarding the Appellant's offer to repay the loans and secure the loans with collateral. The Court prohibited the Appellant from asking the witness Flanagan any questions on cross examination with regard to the Appellant's offer to repay and secure the loans. However, the Court stated that as the exhibits are in evidence, the Appellant may argue that to the jury but would not permit any further questions about it. (A-103-A-104).

The Appellant requested an instruction on the Appellant's offer to repay as said offer related to his intent to injure or defraud the bank. The court rejected the Appellant's requested instruction and refused to give any instruction on an offer to repay.

As the Court stated that the Appellant could argue from

Government Exhibits 47 through 55 in evidence, the Appellant had the right to an instruction on how the jury could consider an offer to repay. By rejecting the Appellant's requested instruction, the court prevented the Appellant from effectively arguing to the jury that the Appellant's offer to repay was evidence of a lack of intent to injure or defraud the bank. Under the circumstances, the rejection by the District Court of the Appellant's requested instruction was error. For this reason, the Appellant's conviction on Counts 7 and 8 should be reversed. .

POINT NO. 3

THE VERDICT IS CONTRARY TO THE
WEIGHT OF THE EVIDENCE AND IS
NOT SUPPORTED BY SUBSTANTIAL
EVIDENCE.

WITH REGARD TO COUNTS 7 and 8 of the indictment:

The record is void of any evidence to indicate that the Appellant knew that the defendant William H. Cleary had exceeded his authority when he approved the loans to Thomas Powers or Westchester Avenue Used Cars, Inc. The record is also void of any evidence to show that the Appellant knew or should have known that the defendant William H. Cleary was misapplying bank funds. One of the elements of the crime of aiding and abetting the misapplication of bank funds is that the aider and abettor know that the misapplication is being committed by the bank officer United States v. Giordano, Supra; Benchwick v. United States, 297 F. 2d. 330 (9th Cir. 1961); United States v. Docherty, Supra. There must be proof that the Appellant had knowledge of the criminal activity of Cleary and encouraged or participated in it with a desire to forward it. As there was no evidence to prove that the Appellant had the requisite knowledge, the judgment of conviction must be reversed.

POINT NO. 4

A FALSE STATEMENT MUST BE MADE
AS TO A MATERIAL FACT IN ORDER
TO FALL WITHIN THE PROHIBITION
OF TITLE 18 UNITED STATES CODE,
SECTION 1014.

The Appellant was accused in Counts 9 through 12 inclusive of the indictment of unlawfully, wilfully and knowingly making false statements of "material" facts upon applications for loans and financial statements for the purpose of influencing the actions of Barclays Bank of New York. The District Court held that the false statement need not be material under Title 18 United States Code, Section 1014.

As the indictment accused the Appellant of making false statements of material facts, the government must be held to the burden of proving materiality as alleged in the indictment. Furthermore, the gist of the offense is the attempt to influence the bank through the delivery or communication of false statements. Whether a false statement is material is relevant and probative on the defendant's intent to influence and mislead the bank. The statement must have the capacity to influence in order to negate innocent intent , United States v. Kernodle, 367 F. Supp 844 (D.C.N.C.1973); United States v. Goberman, 458 F. 2d 226 (3rd. Cir.1972)

Count 10 of the indictment alleges that Carmine Liberatore is the name of the borrower on one of the loan applications or

financial statements. There was no evidence, however, that the Appellant applied for a loan in the name of Carmine Liberatore. There was a loan application in the name of 8626 Realty Corporation which was signed with the name of Carmine Liberatore as vice president. There was also a financial statement which purported to be that of Carmine Liberatore but no loan application was submitted for Carmine Liberatore. A loan was made to 8626 Realty Corporation. As Carmine Liberatore was not the name of the borrower as set forth in Count 10 of the indictment, there was a fatal variance between the indictment and the proof. Furthermore, Carmine Liberatore was not a stockholder of 8626 Realty Corporation nor did he guaranty the repayment of the loan made to 8626 Realty Corporation. Under the circumstances, the financial statement of Carmine Liberatore did not have the capacity to influence the bank.

For the foregoing reasons, the conviction of Appellant on Counts 10 and 12 of the indictment should be reversed.

POINT NO. 5

THE DISTRICT COURT ERRED IN REJECTING THE APPELLANT'S REQUESTED INSTRUCTION OF "MATERIALITY" OF THE ALLEGED FALSE STATEMENTS MADE BY THE APPELLANT TO THE BANK AS BEARING ON THE APPELLANT'S INTENT TO KNOWINGLY MAKE A FALSE STATEMENT TO INFLUENCE THE BANK.

The Appellant requested an instruction on "materiality" with regard to counts 9 through 12 inclusive of the indictment. The requested instruction was rejected.

It is the contention of the Appellant that a false statement must relate to a material fact under Title 18, United States Code, Section 1014. In any event, the materiality of the statement is probative on the Appellant's intent to influence the bank and on the capacity of the statement to influence the bank. The Appellant was entitled to an instruction on the materiality of the alleged false statements in Counts 10 and 12 of the indictment. With regard to Count 12 of the indictment, the Thomas Powers loan, the only evidence regarding the Appellant's knowledge of any false statement related to the use of the proceeds of the loan to pay for a boat. Aside from this, there was no testimony that the Appellant knew of any of the information in the loan application or financial statement or for that matter, that he knew that the application stated that the proceeds of the loan would be used to pay for a boat purchased by the borrower.

The materiality of the false statements in counts 10 and 12 of the indictment being relevant and probative on the issue of Appellant's intent to influence the bank, the Appellant was entitled to an instruction on materiality so that he could have argued that issue before the jury.

CONCLUSION

For the above stated reasons the judgment of conviction on Counts 7,8,10 and 12 of the indictment should be reversed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Murray H. Berman, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 311 W 97th St
NY NY 10025

That on the 3rd day of JUNE, 1977,
deponent personally served the within BRIEF FOR
APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

ROBERT B. FISKE, JR.
UNITED STATES ATTORNEY
ATTORNEY FOR PLAINTIFF APPELLEE
ONE ST. ANDREWS PLAZA
NEW YORK, N.Y. 10007

Sworn to before me this

3rd day of June, 1977

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

